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Filed Jan. 17, 1902.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 113.

LOUISVILLE AND JEFFERSONVILLE FERRY COMPANY

vs.

COMMONWEALTH OF KENTUCKY.

D. W. SANDERS,
For Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

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LOUISVILLE AND JEFFERSONVILLE FERRY COMPANY

vs.

COMMONWEALTH OF KENTUCKY.

I.

It is insisted by the plaintiff in error that the franchise tax attempted to be collected in this action by the defendant in error is unconstitutional, because it is engaged in the operation of a ferry between Louisville and Jeffersonville, which is interstate commerce. Reliance to sustain this position is upon the decisions of this court in Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., 196, and Philadelphia and Southern Steamship Co. *vs.* Pennsylvania, 122 U. S., 326.

Justice Bradley, in delivering the opinion of this court in the steamship case last quoted (p. 345), said:

"The corporate franchises, the property, the business, the "income of corporations created by a State, may undoubtedly

"be taxed by the State; but in imposing all taxes, care "should be taken not to interfere with or hamper, directly "or by indirection, interstate or foreign commerce, or any "other matter exclusively within the Federal Government," &c.

Mr. Justice Field, in delivering the opinion of the Supreme Court in Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., 206, said:

"It is true that property of corporations engaged in for- "eign or interstate commerce, as well as the property of cor- "porations engaged in other business, is subject to State "taxation, provided always it be within the jurisdiction of "the State. As said by Chief Justice Marshall in McCulloch "*vs.* Maryland (4 Wheaton, 316–329), 'All subjects over "which the sovereign power of a State extends are objects "of taxation; but those over which it does not extend, are, "upon the soundest principles, exempt from taxation.' "This proposition may almost be pronounced self-evident."

This ferry company is a domestic corporation created by an act of the legislature of Kentucky. The power of the State is exercised in this instance by the levy of a tax on the franchises granted this corporation. It is the value of the franchises contained in its charter which is the subject of taxation by its sovereign. The procedure to ascertain the value of the franchises is provided for in the taxing laws of the State. In the exercise of this power the board of valuation and assessment ascertained the value of the franchises which enables this corporation to conduct its business, under its charter, in the opera-

tion of its ferry between Louisville and Jeffersonville. The franchise thus taxed is not the ferry privileges granted by the territorial government of Indiana or by the State of Indiana after its admission into the Union; but it is the franchise which enables this corporation to acquire, own, and operate the ferry privileges which were granted by the Territory and the State of Indiana, in the manner set out in the answer in the trial court below. The right to acquire these ferry privileges in Indiana, and the ownership of these ferry privileges in Indiana, is the franchise which the State of Kentucky granted this corporation, and this franchise is the property of the corporation which the State of Kentucky has valued and levied a tax on, in accordance with its constitution and the general taxing laws of the State. It is not the property in Indiana which is taxed, but it is the franchise right in the corporation to acquire ownership of this property. The value of the franchise is ascertained by deducting the value of the tangible property of the corporation from the estimated value of the capital stock of this corporation. The value of the capital stock is determined by the net earnings of the corporation upon a 6 per cent. valuation.

There is no effort on the part of Kentucky to tax the gross receipts of the corporations, or of the passengers transported, or of the freight carried, or of the tonnage of the boats employed by it in the transportation of passengers and freight from Kentucky to Indiana.

The value of the corporate franchise is not to be determined by the fact that boats employed in the transportation of passengers and freight have a right to land on the Indiana shore at Jeffersonville. The value of this right is to be

ascertained and determined by the corporate power granted under the provisions of the charter by the State of Kentucky. Without this power the corporation could not have acquired the ownership of these ferry rights and privileges in Indiana, and the value consists largely under the power granted this corporation to maintain and operate a ferry between the points indicated. The power to acquire the ownership of these ferry privileges in Indiana is a valuable franchise granted this corporation, and it is this franchise which the State undertakes to tax and not the franchise to be a corporation. This franchise authorizes the corporation to purchase these ferry privileges, and also the necessary equipments to operate the ferry, and to pay therefor with its capital stock.

As was said by this court in Henderson Bridge Co. *vs.* Kentucky, 166 U. S., 153 :

" The company was chartered by the State of Kentucky " to build and operate a bridge, and the State could properly " include the franchise which it has granted in the valua- " tion of the company's property for taxation."

Mr. Justice Shiras, in Erie R. R. Co. *vs.* Pennsylvania, 158 U. S., 437, said :

" Undoubtedly, state taxation of interstate commerce, di- " rectly placed upon articles or subjects of such commerce, " or upon the necessary means for their transportation, may " be used to restrict or regulate such commerce, and more " than once this court has been obliged to pronounce in- " valid State legislation respecting these matters. In other " words, we have frequently had occasion to show that the " existence of Federal supervision over interstate commerce,

"and the consequent obligation on the Federal courts to "protect that right of control from encroachments on the "part of the State, are not inconsistent with the power of "each State to control its own internal commerce, or to tax "the franchise, property or business of its own corporations, "engaged in such commerce, nor with its power to tax for- "eign corporations on account of their property within the "State."

In Adams Express Co. *vs.* Ohio, 166 U. S., 221, Mr. Justice Brewer, in delivering the opinion of this court, said:

"The distinction must be noticed between the construc- "tion of a State law and the power of the State. If a stat- "ute, properly construed, contemplates only the taxing of "horses and wagons, then those belonging to an express "company can be taxed at no higher value than those be- "longing to a farmer. But if the State comprehends all "property in its scheme of taxation, then the good will of "an organized and established industry must be recognized "as a thing of value. The capital stock of a corporation, "and the shares in a joint stock company, represent not "only the tangible property, but also the intangible, includ- "ing therein all corporate franchises and all contracts, "privileges and good will of the concern."

II.

It is insisted that the levy of this tax upon the franchises of the corporation is in conflict with the fourteenth amendment of the Constitution of the United States, and therefore unconstitutional.

In the answer of plaintiff in error in the trial court below, it is distinctly stated that it protested against the valuation of the intangible property of this corporation when made by the board of valuation and assessment. It had the opportunity of appearing before the tribunal or the board created by the laws of the State (and did appear) which valued and assessed the franchise in accordance with the taxing laws of the State of Kentucky.

In Hagar *vs.* Reclamation District, 111 U. S., 710, Mr. Justice Field, in delivering the opinion of this court, said:

"But where a tax is levied upon property, not specifically, "but according to its value to be ascertained by assessors "appointed for that purpose, upon such evidence as they "may obtain, a different principle comes in. The officers, "in estimating the value, act judicially, and in most of "the States provision is made for the correction of "errors committed by them, through boards of revis- "ion or equalization setting a designated period pro- "vided by law, to hear complaints respecting the jus- "tice of the assessments. The law, in prescribing the "time when such complaints will be heard, gives all the "notice required, and the proceeding by which the valua- "tion is determined, although it may be followed, if the "tax be not paid, by sale of the delinquent's property, is "due process of law."

Horn Silver Mining Co. *vs.* New York, 143 U. S., 312; opinion of Field.

D. W. Sanders,
For Defendant in Error.

2874